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UNCLAS SECTION 01 OF 05 STATE 128614

E.O. 12958: N/A
TAGS: [CVIS](#) [CMGT](#)
SUBJECT: HIV FINAL RULE

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¶1. SUMMARY: On November 2, the Department of Health and Human Services, Centers for Disease Control and Prevention (HHS/CDC), published a Final Rule in the Federal Register that will remove HIV infection from the list of communicable diseases of public health significance and remove references to HIV from the scope of medical examinations for aliens. The final rule will go into effect on January 4, 2010. This cable provides guidance to posts for handling cases involving HIV after January 4, 2010, and in the interim. END SUMMARY.

¶2. The CDC published a final rule in the Federal Register on November 2, 2009, entitled Medical Examination of Aliens - Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance (HIV Final Rule) (<http://www.gpo.gov/fdsys/pkg/FR-2009-11-02/pdf/E9-26337.pdf>). The final rule amends Title 42 of the Code of Federal Regulations (CFR), Part 34, by removing HIV infection from the definition of communicable disease of public health significance and by removing references to HIV from the scope of medical examinations for aliens. The final rule goes into effect on January 4, 2010. As of this date, HIV infection will no longer be an inadmissible condition, and HIV testing will no longer be required for medical examinations for visa purposes. Further, applicants who are HIV-positive will no longer require waiver processing by the Department of Homeland Security (DHS).

FAM Updates

¶3. By the effective date of the final rule, January 4, 2010, the HIV Technical Instructions will be removed from the CDC website. CDC guidance to panel physicians about the HIV final rule is forthcoming and will be posted on the CDC website. The guidance from CDC will discuss panel physicians counseling applicants on HIV and recommend testing to any visa applicants who may benefit from having testing for HIV infection. A panel physician may also perform the HIV testing if the applicant consents to it, but must disclose to the applicant that the applicant does not have to be tested for HIV and that the results of the HIV test will be provided to the consular section processing his or her visa application as part of the visa medical examination packet of forms.

When HIV infection is disclosed by an applicant, the panel physician should record the HIV infection as a Class B Other condition on the DS 2053/2054. Panel physicians should put a line through the spaces for HIV test results on the DS 2053/2054 until those forms are amended.

¶4. A new Note will be added to 9 FAM as 9 FAM 42.66 and

will read as follows:

9 FAM 42.66 N17 APPLICANTS SUSPECTED OF BEING HIV
POSITIVE BY THE PANEL PHYSICIAN

On November 2, 2009, CDC issued the HIV Final Rule removing HIV infection from the definition of communicable disease of public health significance effective January 4, 2010. It removed HIV infection as a ground of ineligibility under 42 CFR 34 and serologic testing for HIV from the scope of the medical examination for immigration purposes. However, for applicants who may benefit from being tested for HIV, the panel physician may counsel the applicant about HIV, and may administer an HIV serologic test, if the applicant consents to the testing. The panel physician must also inform the applicant that they do not have to be tested for HIV and that the results of the HIV serologic testing will be provided to the consular section processing his or her visa application as part of the visa medical examination packet of forms.

---END Text of Revised 9 FAM 42.66 N17---

15. 9 FAM 40.11 N9 will be amended as follows to reflect the change to the list of communicable disease of public health significance:

INA 212(a)(1)(A)(i) refers to an excludable disease as "communicable disease of public health significance."

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The CDC Technical Instructions lists these diseases in 42 CFR 34(b). The following diseases are those that CDC currently defines as "communicable diseases of public health significance:" Note that as of January 4, 2010, HIV is no longer included in this list.

- (1) Chancroid;
- (2) Communicable diseases as listed until Section 361(b) of the Public Health Service Act. The revised list of quarantinable communicable diseases is available on the CDC Public Health Service website;
- (3) Communicable diseases that may pose a public health emergency of international concern if it meets one or more of the listed factors in 42 CFR 34.3(d);
- (4) Gonorrhea;
- (5) Granuloma inguinale;
- (6) Hansen's disease (Leprosy), infectious;
- (7) Lymphogranuloma venereum;
- (8) Syphilis, infectious stage; and
- (9) Tuberculosis, active.

---END Text of Revised 9 FAM 40.11 N9---

16. 9 FAM 40.11 N9.1 will be amended as follows to reflect the change in regulation:

HIV-positive applicants who were refused a visa under INA Section 212(a)(1)(A)(i) prior to January 4, 2010, are no longer ineligible. Procedures for processing these cases are as follows:

- a. If the last refusal on the case was less than one year ago, then the 212(a)(1)(A)(i) refusal should be overcome/waived in the system and a CLOK should be sent to remove the ineligibility from CLASS. If the medical examination has expired it must be repeated.

b. If the last refusal on the case was more than one year ago, then the applicant must reapply for a visa, complete a new medical examination with a panel physician, and pay all applicable fees. The 212(a)(1)(A)(i) refusal should be overcome/waived in the system at the time of interview and a CLOK should be sent to remove the ineligibility from CLASS. If the applicant is otherwise eligible, then the visa may be issued.

c. If a waiver application has already been submitted to USCIS and is pending decision, the application should be held until USCIS approval is granted or until January 4, 2010, when a CLOK may be sent and the visa issued without a waiver (see para 11).

---END Text of Revised 9 FAM 40.11 N9.1---

Although applicants with HIV cannot be found ineligible for visas under Section 212(a)(1)(A)(i) of the INA starting on January 4, 2010, they still must overcome INA Section 212(a)(4), public charge, by demonstrating to consular officers that they will have means of support in the United States and that they, therefore, will not need to seek public financial assistance.

18. 9 FAM 40.11 N9.1-1 will be amended as follows to reflect the change in regulation:

a. Under section 212(a)(4) of the INA, an immigrant visa (IV) applicant must demonstrate that he or she has a means of support in the United States and that he or she, therefore, will not need to seek public financial assistance. It may be difficult for HIV-positive applicants to meet this requirement of the law because the cost of treating the illness can be very high and because the applicant may not be able to work or obtain medical insurance. You must be satisfied that the applicant has access to funds sufficient for his or her support. You need to consider the family's income and other assets, including medical insurance coverage for any and all HIV-related expenses, availability of public health services and hospitalization for which no provision for collecting fees from patients are made, and any other relevant factors in making this determination.

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b. There is no waiver possible for this inadmissibility; however, if the applicant is able to demonstrate that he or she has acquired additional insurance or funds which would be sufficient to overcome the inadmissibility, you may determine that the ineligibility no longer applies.

c. On November 2, 2009, CDC issued the HIV Final Rule removing HIV infection from the definition of communicable disease of public health significance effective January 4, 2010. Although HIV infection is no longer a ground of ineligibility under section 212(a)(1)(A)(i) of the INA, the requirement that an HIV-positive applicant must demonstrate that he or she overcomes inadmissibility under section 212(a)(4) of the INA remains.

---END Text of Revised 9 FAM 40.11 N9.1-1---

19. The following 9 FAM Notes and Exhibits are also being amended to remove all references to HIV that are no longer applicable: 9 FAM 40.6, Exhibit I; 9 FAM 40.11 Notes; 9 FAM 41.108 Notes; 9 FAM 42.66 Notes; 9 FAM 42.66, Exhibit I; and 9 FAM 42.66, Exhibit II. As these amendments consist mainly of deletions, they are not being provided in this ALDAC.

Medical Form Revisions

¶10. The following medical examination forms are being revised to remove references to HIV and the sections for the laboratory findings of the HIV test: Form DS-2053, Medical Examination For Immigrant or Refugee Applicant (For use with TB Technical Instructions 1991 and the DS-3024); Form DS-2054, Medical Examination For Immigrant or Refugee Applicant (For use with TB Technical Instructions 2007 and the DS-3030); and Form DS-3030, Chest X-Ray And Classification Worksheet. Panel physicians should continue using the current versions of the forms through January 3, 2010, and should begin using the revised versions on January 4, 2010.

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Interim Refusals for HIV Cases between now and January 4, 2010

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¶11. Until the final rule goes into effect on January 4, 2010, any HIV-positive visa applicants must still be found ineligible to receive a visa under INA Section 212(a)(1)(A)(i). Applicants may continue to apply for waivers of ineligibility from DHS. In a memorandum (<http://www.uscis.gov/USCIS/New%20Structure/Laws%20and%20Regulations/Memoranda/2009/HIVInadmissibilityFinalHHSRule.pdf>) dated November 24, 2009, DHS directed its USCIS officers to hold in abeyance until January 4, 2010, any waiver application which would be denied under current law solely based on HIV infection. That said, if the waiver is pending, and the applicant has already filed a waiver application which is approvable, the memorandum instructed USCIS officers to grant those waivers so that the cases can move forward. Also, certain NIV applicants will continue to benefit from the HIV Waiver Authorization Final Rule. Applicants may also choose to not submit waiver requests, but rather to wait until January 4, 2010, when they will no longer be ineligible under INA Section 212(a)(1)(A)(i). Any such applicants must still be refused in IVO or NIV, and posts would overcome the refusal on or after January 4, 2010.

Qs and As

¶12. Posts that receive inquiries from the public and the press concerning the removal of HIV infection from the definition of communicable disease of public health significance are advised to use the following Qs and As, which will be posted on the CA Web intranet Visa Updates and Announcements and Content Finder sections. On the Travel.state.gov Visa section, the Qs and As will be under Visa News on the right rail:

Q: Why has it taken the United States so long to implement changes for non-U.S. citizens who are HIV-positive to visit or live in the United States?

-- On July 30, 2008, President Bush signed the United

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States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, which amended the Immigration and Nationality Act (INA) to eliminate language that specified HIV infection as a public health condition that can prevent non-U.S. citizens from entering the United States with HIV without first obtaining a waiver from the Department of Homeland Security (DHS).

-- The Act did not change the regulatory framework under which HIV is handled for visa purposes. Because HIV was still on the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention's (HHS/CDC) list of communicable diseases of public health significance, HIV-positive applicants who applied for United States visas or entry into the United States remained inadmissible and still required waivers from DHS.

Q: Why is the CDC removing HIV infection from both the definition of communicable disease of public health significance and the scope of the medical examination for visa purposes?

-- On July 2, 2009, CDC proposed a rule change to amend Title 42 of the Code of Federal Regulations (CFR), Part 34, by removing HIV from the list of communicable disease of public health significance and from the scope of the medical examination for aliens, which was published in the Federal Register as a Notice of Proposed Rulemaking (NPRM) for a 45-day public comment period.

-- The CDC reviewed all public comments it received and published a Final Rule in the Federal Register on November 2, 2009, which contains no changes from the NPRM. The final rule is effective January 4, 2010, and it removes HIV from the definition of a communicable disease of public health significance and references to HIV from the scope of medical examinations for aliens.

-- The CDC determined that while HIV infection is a serious health condition, it is not a communicable disease that is a significant public health risk for introduction, transmission, and spread through casual contact.

-- We refer you to the CDC for further guidance.

Q: How does this new regulation change the visa application process for applicants who are HIV-positive?

-- Until the final rule goes into effect on January 4, 2010, non-U.S. citizens who are HIV-positive cannot be admitted to the United States unless granted a waiver by the Department of Homeland Security (DHS). Certain nonimmigrants may qualify for issuance of visas from consular officers without applying to DHS for waivers under a streamlined process established by DHS in its HIV Waiver Final Rule.

-- Effective January 4, 2010, visa applicants required to receive medical examinations will not be tested for HIV, and HIV-positive visa applicants will not be found ineligible for visas under Section 212(a)(1)(A)(i) of the INA and will not need waivers from the Department of Homeland Security (DHS) prior to being issued visas, if otherwise qualified.

-- Although applicants with HIV cannot be found ineligible for visas under Section 212(a)(1)(A)(i) of the INA starting on January 4, 2010, they still must overcome INA Section 212(a)(4), public charge, by demonstrating to consular officers that they will have means of support in the United States and that they, therefore, will not need to seek public financial assistance.

Q: How will this change affect HIV-positive applicants who have previously been refused a visa?

-- Effective January 4, 2010 applicants who were previously refused visas only under INA Section 212(a)(1)(A)(i) and only because they were HIV positive may be eligible for a visa. These applicants may reapply for a visa. A consular officer will then

determine whether or not the applicant is qualified.

Q: How will this change affect how applicants complete their visa applicant forms?

The DS-156 Nonimmigrant Visa Application, DS-160 Online
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Nonimmigrant Application, and DS-230 Application for Immigrant Visa and Alien Registration forms contain the following question: "Have you ever been afflicted with a communicable disease of public health significance or a dangerous physical or mental disorder, or ever been a drug user or addict?" Effective January 4, 2010, HIV-positive visa applicants will no longer have to answer "Yes" to this question based solely on their HIV status. Applicants who are HIV-positive, and can otherwise answer "No" to the question, should answer "No" beginning on January 4, 2010.

Q: Are there any restrictions under this new rule?

-- No. After the final rule goes into effect on January 4, 2010, HIV-positive visa applicants will no longer be ineligible to receive visas under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act (INA.)

Q: How will non-US citizens with HIV find out about this new change?

-- All U.S. embassies and consulates will disseminate information on the final rule to the general public as necessary.

-- Consular officers will inform any visa applicants with HIV infection who apply for and are found ineligible for visas between now and January 4, 2010 about the final rule. Until January 4, 2010, visa applicants with HIV may still apply for waivers of ineligibility under Section 212(a)(1)(A)(i) of the INA from DHS. Certain nonimmigrants may qualify for visas without first applying to DHS for waivers under a streamlined process established by DHS in its HIV Waiver Final Rule. Alternatively, applicants previously refused visas under Section 212(a)(1)(A)(i) of the INA may opt to wait to apply for visas until January 4, 2010, when they will no longer be ineligible.

-- Additional guidance is available on CDC's website (http://www.cdc.gov/ncidod/dq/laws_regs/fed_reg/remove-hiv/final-rule-hiv.htm).

Q: Before the effective date of January 4, 2010, what changes will take place for non-U.S. citizens with HIV infection who wish to enter the United States?

-- Until the final rule goes into effect on January 4, 2010, non-U.S. citizens who have HIV cannot be admitted to the United States without waivers granted by the Department of Homeland Security (DHS). Certain nonimmigrants may qualify for issuance of visas from consular officers without first applying to DHS for waivers under a streamlined process established by DHS in its HIV Waiver Final Rule.

Q: Who is affected by the rule change?

-- Effective January 4, 2010, all non-U.S. citizens with HIV who apply for visas or who apply for entry to the United States will be affected by the final rule because they will no longer be ineligible under Section 212(a)(1)(A)(i) of the INA.

-- Additionally, all immigrant visa applicants and refugees and some nonimmigrant visa applicants are

required to have medical examinations prior to entrance into the United States. Effective January 4, 2010, they will be affected by the final rule because it removes HIV from the scope of medical examinations for visa applicants, including HIV testing.

Q: Will the rule change increase the risk that average Americans will contract HIV?

-- The CDC has determined that allowing non-U.S. citizens with HIV infection to enter the United States will not pose a health risk to the American public because HIV is preventable and not spread through casual contact or day-to-day activities.

-- We refer you to the CDC's website (http://www.cdc.gov/ncidod/dq/laws_regs/fed_reg/remove-hiv/final-rule-hiv.htm) for further information.

¶13. Any procedural questions about this guidance should be directed to CA/VO/F/P Rachel Hilton.

¶14. MINIMIZE CONSIDERED.
CLINTON